

August 2005-Part 1

MJI Publications Updates

Crime Victim Rights Manual

**Criminal Procedure Monograph 3—
Misdemeanor Arraignments & Pleas
(Revised Edition)**

**Criminal Procedure Monograph 5—
Preliminary Examinations (Revised
Edition)**

**Criminal Procedure Monograph 7—
Probation Revocation (Revised Edition)**

Domestic Violence Benchbook (3rd ed)

August 2005

Update: Crime Victim Rights Manual (Revised Edition)

CHAPTER 4

Protection From Revictimization

4.1 The Victim's Constitutional Right to Reasonable Protection From Revictimization by the Accused

Insert the following text on page 54 immediately before Section 4.2:

See also *Town of Castle Rock v Gonzales*, 545 US ____ (2005) (a person does not have a constitutionally protected property interest in having police officers enforce a restraining order obtained under state law even when the officers have probable cause to believe the order has been violated).

CHAPTER 10

Restitution

10.2 Claims for Restitution Made After Sentencing or Disposition

Replace the last sentence in the partial paragraph at the top of page 312 with the following:

MCR 6.425(E)(1)(f)* requires the court on the record to “order that the defendant make full restitution as required by law to any victim of the defendant’s course of conduct that gives rise to the conviction, or to that victim’s estate.”

In addition, delete the first sentence in the **Note** following the partial paragraph at the top of page 312.

*Effective July 13, 2005. MCR 6.425(E)(1)(f) replaces the former MCR 6.425(D)(2)(f).

CHAPTER 10

Restitution

10.8 Amount of Restitution Required

Insert the following case summary after the first paragraph on page 325:

In *People v Dewald*, ___ Mich App ___, ___ (2005), the defendant was convicted of false pretenses, common-law fraud, and larceny by conversion. During the 2000 presidential election and recount, defendant's political action committees (PACs) solicited \$700,000.00 in contributions from victims through letters that implied affiliation with either the Bush or Gore campaign and recount effort. The victims' donations were not contributed to the campaigns although some of the money was contributed to Democratic and Republican causes. The victims testified that they intended their contributions to go to the campaigns and recount efforts. The trial court ordered the defendant to pay restitution in an amount equal to the victims' contributions to the PACs less an amount seized by the Attorney General's office prior to trial. On appeal, defendant argued that the victims did not suffer any loss. The Court of Appeals disagreed, finding that the victims contributed money to the defendant's PACs intending it to go to the presidential campaigns, and none of the contributions actually did go to the campaigns. *Dewald, supra* at _____. In addition, the amount of restitution was proper even though defendant did not personally benefit to the extent of the amount of the restitution ordered. *Id.* at ___, citing *Lueth, infra*.

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Update: Criminal Procedure Monograph 3—Misdemeanor Arraignments & Pleas (Revised Edition)

Part A—Commentary on Misdemeanor Arraignments

3.12 Waiver of the Right to Counsel

Add the following case summary after the August 2004 update to pages 20–21:

A defendant’s waiver of counsel may be voluntary and unequivocal even when the defendant admitted “[he] would rather not represent [him]self” but decided to do so because *pro se* representation provided him with greater access to police reports and other information not otherwise available to him when he was represented by counsel. *Jones v Jamrog*, ___ F3d ___, ___ (CA 6, 2005).

“In this case, [the defendant] considered his circumstances and decided that ‘in his particular case counsel [was not] to his advantage.’ *Faretta, supra*, at 835. In accordance with its discovery policy, the state refused to turn over police reports to him, instead providing them only to his attorney. [The defendant] was able to review the reports and discuss them with his attorney, but only when his attorney was available to do so and only for as long as the attorney had time. Consequently, the state’s discovery policy presented [the defendant] with a real-world obstacle that he had no choice but to negotiate. The approach he selected was to forgo his right to counsel in order that he might have more time to review the police reports and do counter-investigative work in preparation for his defense at trial. The mere fact that this approach had an obvious and significant cost—the relinquishment of a lawyer’s assistance—does not mean that [the defendant’s] decision to pursue the approach was involuntary.” *Jones, supra* at ____.

Part B—Commentary on Pleas

3.28 Advice About the Right to Trial

On page 47, delete the **Note** near the top of the page. Effective July 13, 2005, MCR 6.302(B)(3)(b) was deleted.

Part B—Commentary on Pleas

3.31 Plea Must Be Understanding and Voluntary

An understanding plea in circuit court.

Delete the **Note** on page 54 and insert the following text:

Effective July 13, 2005, the provisions in MCR 6.302(B)(6)(a)–(d) were deleted to conform the rule to the United States Supreme Court’s decision in *Halbert v Michigan*, 545 US ____ (2005). See the July 2005 update to page 68 for information on *Halbert*, *supra*.

Part B—Commentary on Pleas

3.40 **Appealing a Plea-Based Conviction**

On page 67, delete the second sentence, including the quotation of MCR 6.625. Effective July 13, 2005, the quoted portion of MCR 6.625 was deleted to conform the rule to the United States Supreme Court's decision in *Halbert v Michigan*, 545 US ____ (2005).

Update: Criminal Procedure Monograph 5—Preliminary Examinations (Revised Edition)

Part A—Commentary

5.13 Waiver of Right to Counsel

Add the following case summary after the August 2004 update to page 19:

A defendant's waiver of counsel may be voluntary and unequivocal even when the defendant admitted "[he] would rather not represent [him]self" but decided to do so because *pro se* representation provided him with greater access to police reports and other information not otherwise available to him when he was represented by counsel. *Jones v Jamrog*, ___ F3d ___, ___ (CA 6, 2005).

"In this case, [the defendant] considered his circumstances and decided that 'in his particular case counsel [was not] to his advantage.' *Faretta, supra*, at 835. In accordance with its discovery policy, the state refused to turn over police reports to him, instead providing them only to his attorney. [The defendant] was able to review the reports and discuss them with his attorney, but only when his attorney was available to do so and only for as long as the attorney had time. Consequently, the state's discovery policy presented [the defendant] with a real-world obstacle that he had no choice but to negotiate. The approach he selected was to forgo his right to counsel in order that he might have more time to review the police reports and do counter-investigative work in preparation for his defense at trial. The mere fact that this approach had an obvious and significant cost—the relinquishment of a lawyer's assistance—does not mean that [the defendant's] decision to pursue the approach was involuntary." *Jones, supra* at ____.

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Update: Criminal Procedure Monograph 7—Probation Revocation (Revised Edition)

Part A—Commentary

7.19 Judges Who May Preside Over Revocation Proceedings

Effective July 13, 2005, consent of the court granting probation is no longer required before a probationer can plead guilty to a probation violation. MCR 6.445(F). On page 18, delete the second sentence.

Part A—Commentary

7.25 Summary of Procedures for Accepting Guilty and *Nolo Contendere* Pleas

Effective July 13, 2005, consent of the court granting probation is no longer required before a probationer can plead guilty to a probation violation. On page 23, replace the first sentence in the quoted portion of MCR 6.445(F) with the following text:

“(F) *Pleas of Guilty*. The probationer may, at the arraignment or afterward, plead guilty to the violation.”

Part A—Commentary

7.29 Alternatives Following a Finding of Probation Violation

Insert the following language after the July 2005 update to page 27:

Because the rule in *People v Hendrick*, 472 Mich 555 (2005), was clearly foreshadowed by the unambiguous language in MCL 771.4 and MCL 769.34(2), it applies retroactively. *People v Parker*, ___ Mich App ___, ___ (2005).

Part A—Commentary

7.31 Summary of Required Procedures for Imposing Sentence Following Revocation of Probation

Effective July 13, 2005, MCR 6.445(G) was amended to conform the rule to amendments to MCR 6.425. Replace the quote of MCR 6.445(G) on pages 28–29 with the following:

“If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report and having complied with the provisions set forth in MCR 6.425(B) and (E).”

Part A—Commentary

7.32 Receiving an Updated Presentence Report

Replace the quotation of MCR 6.425(B) on page 29 with the following:

MCR 6.425(B)* states:

“The court must provide copies of the presentence report to the prosecutor and the defendant’s lawyer, or the defendant if not represented by a lawyer, at a reasonable time before the day of sentencing. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court’s decision to exempt part of the report from disclosure is subject to appellate review.”

Proposed scoring of the sentencing guidelines must accompany the presentence report. MCR 6.425(D).*

*Effective July 13, 2005.

*Effective July 13, 2005.

Part A—Commentary

7.33 Required Procedures at the Sentencing Hearing

Effective July 13, 2005, MCR 6.425 was amended. MCR 6.425(D)(2)–(3) were relettered (E)(1)–(2), and substantive changes were also made. On page 30, replace the quotation of MCR 6.425(D)(2) with the following:

MCR 6.425(E)(1) states:

“The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

“(a) determine that the defendant, the defendant’s lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,

“(b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule (E)(2),*

“(c) give the defendant, the defendant’s lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence,

“(d) state the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled,*

“(e) if the sentence imposed is not within the guidelines range, articulate the substantial and compelling reasons justifying that specific departure, and

“(f) order that the defendant make full restitution as required by law to any victim of the defendant’s course of conduct that gives rise to the conviction, or to that victim’s estate.”

Replace the first sentence of the first paragraph on page 31 with the following:

MCR 6.425(E)(1)(f) requires the court to “order that the defendant make full restitution as required by law”

*See Section 7.34, below.

*See Section 7.35, below, for discussion of credit for time served.

Part A—Commentary

7.34 Responding to Challenges to the Presentence Report

On page 31, replace the quote of MCR 6.425(D)(3) with the following:

MCR 6.425(E)(2)* states:

“If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

“(a) correct or delete the challenged information in the report, whichever is appropriate, and

“(b) provide defendant’s lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.”

*Effective July 13, 2005.

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Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 8

Enforcing Personal Protection Orders

8.5 Initiating Criminal Contempt Proceedings by Warrantless Arrest

Insert the following “**Note**” after the first paragraph on page 328:

Note: A petitioner who obtains a PPO does not have a constitutionally protected right to have it enforced even when officers have probable cause to believe that a violation has occurred. *Town of Castle Rock v Gonzales*, 545 US ___, ___ (2005).

CHAPTER 9

Statutory Firearms Restrictions in Domestic Violence Cases

9.5 Restrictions Arising from Conviction of a Felony

B. Michigan Restrictions on the Purchase or Possession of Firearms by Convicted Felons

Add the following text to the July 2004 update to this subsection:

The Michigan Supreme Court affirmed the Court of Appeals' holding. *People v Perkins*, ___ Mich ___, ___ (2005).